



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

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July 28, 1997

## AGENDA ITEM

For Meeting of: 8-14-97

### MEMORANDUM

TO: The Commission

THROUGH: John C. Surina *John C. Surina*  
Staff Director

FROM: Lawrence M. Noble *Lawrence M. Noble*  
General Counsel

N. Bradley Litchfield *N. Bradley Litchfield*  
Associate General Counsel

SUBJECT: Final Draft Advisory Opinion 1997-12

Attached is the final draft of the subject opinion for circulation and tally vote with a 72 hour deadline.

The changes in this draft are made pursuant to the Commission's discussion and motion on July 24, 1997, directing this office to prepare a final draft that would be circulated on tally vote without returning it to the agenda.

The significant changes to Agenda Document #97-49 are found on pages 8, 9 and 10. See bold font text. In summary, an allocation approach is required for legal services #3 and #7. All legal services described in #6 are allowed to be paid from campaign funds.

Attachment

**DRAFT**

1 ADVISORY OPINION 1997-12

2  
3 Jeffrey D. Colman  
4 Jenner & Block  
5 One IBM Plaza  
6 Chicago, Illinois 60611

7  
8 Dear Mr. Colman:  
9

10 This responds to your letter dated June 24, 1997, on behalf of United States  
11 Representative Jerry Costello of Illinois and his campaign committee, which requests an  
12 advisory opinion concerning application of the Federal Election Campaign Act of 1971,  
13 as amended ("the Act"), and Commission regulations to the use of Mr. Costello's  
14 campaign funds to pay various expenses he has incurred for services provided by your  
15 law firm, Jenner & Block.

16 Representative Costello was first elected to Congress in 1988 from the 21st  
17 Congressional District of Illinois (later it was redrawn as the 12th district) and has been  
18 re-elected in each subsequent general election, including 1996. You indicate that he is  
19 also a candidate for re-election in the 1998 election cycle.<sup>1</sup> Your letter explains that,  
20 within a period beginning in September 1995 and continuing until June 1997, Mr.  
21 Costello has been subjected to allegations, widely reported in newspapers circulated  
22 within the 12th congressional district of Illinois, which relate to his relationship with  
23 Amiel Cueto. You state that Mr. Costello vehemently denies any allegation of  
24 wrongdoing. His campaign committee maintains funds which he and the committee wish  
25 to utilize to defray expenses he incurred with your law firm for a variety of legal services.

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<sup>1</sup> Commission records indicate that Mr. Costello filed a Statement of Candidacy (FEC Form 2) for the 1998 election cycle on January 24, 1997.

1           Mr. Costello and his committee believe these expenses are "campaign-related  
2 both because the specific allegations raised in the press relate to . . . [his] performance as  
3 an elected official and because certain of the allegations became campaign issues in the  
4 1996 primary and general elections and they likely will be raised as issues in the 1998  
5 election." Because Mr. Costello has been required to respond to certain of these issues  
6 within the context of his 1996 campaign and will need to respond in the context of the  
7 1998 campaign, he views the proposed committee expenditures for legal advisory  
8 services by your firm as necessary to his campaign for re-election. Representative  
9 Costello and his authorized committee request an opinion from the Commission  
10 concerning the propriety of using campaign funds for payments to your law firm for  
11 attorney services by members of the firm and related expenses.

## 12   **Background**

13           You explain that in late 1995, Thomas Venezia (and others) were convicted in  
14 Federal court in southern Illinois on charges of gambling-related racketeering. In the  
15 course of this trial, witnesses testified about business and "political connections allegedly  
16 involving" Venezia, Cueto and Mr. Costello. This testimony was reported in the  
17 *Belleville News-Democrat* and *St. Louis Post-Dispatch*, and was made an issue in Mr.  
18 Costello's efforts to win reelection in 1996. The request includes seven press clippings  
19 from the cited two newspapers (during the period from September 22, 1995 through  
20 October 29, 1996) and one political advertisement (published just two days before the  
21 1996 general election) that relate, in part, to the reputed association among Mr. Costello,  
22 Venezia, and Cueto.

1 In August 1996, Amiel Cueto, together with two other defendants, was indicted  
2 for obstruction of justice, conspiracy, and a number of other Federal crimes. The co-  
3 defendants pled guilty. Mr. Cueto was tried between April and June 1997; he was  
4 convicted on June 11, 1997.

5 **Press-Reported Specific Allegations**

6 According to your letter, Mr. Cueto and Mr. Costello were best friends for many  
7 years. They served as best man at each other's weddings, and they have extremely close  
8 family relations. They also were partners in a business venture starting in the 1980s and  
9 terminating in August 1992.

10 You further state that, during the course of the Cueto trial, Mr. Costello, together  
11 with others, was named as an unindicted co-conspirator. However, Mr. Costello has  
12 never been charged with any wrongdoing, and he has not been identified to your firm as a  
13 subject or target of any criminal investigation. Mr. Costello voluntarily appeared before a  
14 Federal grand jury in April 1996, and, through your office, he advised both the  
15 prosecution and defense in the Cueto case that he was available to testify at the Cueto  
16 trial if they so desired. Neither side called Mr. Costello as a witness.

17 As is apparent from 17 press articles published between April 10 and June 18,  
18 1997, and enclosed with your advisory opinion request, the testimony in the Cueto case  
19 was widely reported in the media.<sup>2</sup> These articles indicate, according to your accurate  
20 summary of them, three principal allegations which formed the basis of the media's

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<sup>2</sup> All of these articles, except one, appeared in the two newspapers cited above. One article, dated May 19, 1997, was taken from the *Chicago Sun-Times*.

1 coverage of Mr. Costello. Following the Cueto trial, Mr. Costello met with the media to  
2 discuss these matters in detail. (See *St. Louis Post-Dispatch*, June 15, 1997.)

3 First, there was hearsay testimony that Mr. Costello was a "silent partner" in  
4 business dealings with Cueto and Venezia. Mr. Costello has repeatedly denied those  
5 allegations.

6 Second, an allegation was made and reported in the media that Mr. Costello, in his  
7 capacity as an elected public official and leader in the Democratic Party, met with St.  
8 Clair County State's Attorney Robert Haida in an attempt to convince Haida to vacate his  
9 position as State's Attorney, accept a judgeship, and assist in convincing John Baricevic  
10 (the Chairman of the St. Clair County Board) to appoint Cueto as State's Attorney of St.  
11 Clair County. Mr. Costello has acknowledged that he met with State's Attorney Haida  
12 and that they discussed the possibility of Haida becoming a judge, but Mr. Costello  
13 denies there was any discussion about Cueto succeeding Haida as State's Attorney.  
14 Moreover, Mr. Baricevic has confirmed that in his discussions with Haida, Haida said  
15 nothing about Mr. Costello asking Haida to assist in getting Cueto picked as State's  
16 Attorney.

17 Third, an allegation was made that Mr. Costello supported legislation in Congress  
18 designed to recognize the Pokagon band of the Potawatami Indians at a time when Mr.  
19 Costello allegedly had a "secret" interest in <sup>a</sup> business venture (with Cueto and another  
20 person) which would then run a land-based gambling casino on Indian property in  
21 southern Illinois. Mr. Costello acknowledged that he voted for the legislation, but he  
22 denies that he had any interest in the gambling venture.

**Services Rendered By Jenner & Block**

You further explain that, in its capacity as counsel to Mr. Costello and his committee, the firm has carefully investigated each of the allegations discussed above, and has advised Mr. Costello with regard to his dealings with the media, the United States Attorney's Office, and Mr. Cueto's defense counsel. Specifically, your request states that members of the firm have rendered the following legal services to Mr. Costello:

1. Reviewed and monitored the allegations made against Mr. Costello in the Cueto case and reported in the media.

2. Conferred with Mr. Costello on numerous occasions with regard to the attacks made against him in the media and the testimony in the Cueto proceeding.

3. Investigated the factual allegations set forth above, interviewed witnesses, conferred with counsel for various individuals, and reviewed documents in order to work with Mr. Costello to respond to the allegations.

4. Counseled Mr. Costello with regard to his response to media attacks relating to each of the allegations.

5. Participated in the preparation and revision of press statements.

6. Conducted legal research with regard to the appropriateness of Mr. Costello testifying about the Indian recognition bill and specifically reviewed speech and debate privilege issues.

7. Represented Mr. Costello when he voluntarily appeared as a witness before the grand jury in April 1996, and interacted with the United States Attorney's Office on his behalf both in anticipation of the grand jury appearance and in conjunction with the possibility that he might testify at trial.

1           8. Reviewed the provisions of the Act, applicable Commission regulations, and  
2 advisory opinions with regard to the appropriateness of Mr. Costello's campaign  
3 committee reimbursing the firm for legal expenses incurred in this matter.

4           Your letter asserts your belief that the described legal services would not have  
5 been required but for Mr. Costello's status as an elected Federal officeholder and the fact  
6 that he ran for reelection in 1996 and intends to run again in 1998. Specifically, the  
7 allegations relating to the Indian recognition legislation and the Haida meeting involved  
8 Mr. Costello's role as an elected public official, and certain of the allegations were likely  
9 to, and indeed did, generate press coverage which impacted on his campaign in 1996 and  
10 may impact on his campaign in 1998.

#### 11   **Legal Analysis and Conclusions**

12           As you know, the Commission has historically recognized that candidates have  
13 wide discretion in making expenditures to influence their election. See, e.g., Advisory  
14 Opinion 1995-42. However, the Act prohibits the conversion of campaign funds to  
15 personal use. 2 U.S.C. §439a. Commission regulations at 11 CFR 113.1(g) define  
16 personal use for the purposes of this prohibition. Generally, personal use is any use of  
17 funds in a campaign account of a present or former candidate to fulfill a commitment,  
18 obligation or expense of any person that would exist irrespective of the candidate's  
19 campaign or duties as a Federal officeholder. The rules list certain uses of campaign  
20 funds that will be considered *per se* personal use. Other uses of campaign funds will be  
21 examined on a case by case basis using the general definition of personal use. 11 CFR  
22 113.1(g)(1).

1           Your law firm serves as legal counsel to Mr. Costello and his authorized  
2 campaign committee. Under the personal use rules, expenses for attorney services are  
3 among those uses that will be examined on a case by case basis using the general  
4 definition of personal use. 11 CFR 113.1(g)(1)(ii)(A). Thus, the use of campaign funds  
5 for attorney fees and expenses ("legal expenses") that would exist even if Mr. Costello  
6 were not a candidate or Member of Congress would be a conversion to personal use.  
7 Conversely, the use of campaign funds to pay legal expenses that would not exist absent  
8 his candidacy or Federal officeholder status would be permissible.

9           Ordinarily, legal expenses associated with refuting or responding to allegations  
10 about one's private business ventures (whether merely contemplated or actually  
11 conducted), or regarding one's personal association with others facing criminal  
12 prosecution, would be considered personal in nature, since, standing alone, such matters  
13 are unrelated to campaign or officeholder activity. See Advisory Opinion 1996-24 [legal  
14 counsel to Member of Congress for matters of marital status, compliance with local  
15 construction codes, veteran benefits eligibility, and tax law issues generally considered of  
16 personal nature]. However, the need for some of the services of your firm appears to  
17 have resulted directly from the political necessity for Mr. Costello to respond to  
18 allegations of wrongful conduct that <sup>well</sup> was reported by the news media and alleged to have  
19 happened during periods when he was a Federal officeholder and candidate. Although  
20 these expenses could be incurred by any person who is both prominent in a given  
21 community and the subject of similar allegations, and in that sense could exist  
22 irrespective of candidacy or officeholder status, the Commission recognizes that the  
23 activities of candidates and officeholders may receive heightened scrutiny and attention



1 because of their status as candidates and officeholders. Advisory Opinion 1996-24. The  
2 obvious need for a candidate to respond to allegations carried in the news media which  
3 result from this elevated scrutiny would not exist irrespective of the candidate's campaign  
4 or officeholder status. *Id.*

5 Consequently, the Commission concludes that if allegations of improper or  
6 wrongful conduct are made about a candidate in a campaign context and reported in the  
7 public media, the candidate may use campaign funds for the purpose of publicly  
8 responding to those allegations, even if the underlying activities cited in the allegations  
9 may not themselves be related to the campaign or officeholder functions. This conclusion  
10 means that Mr. Costello may use campaign funds for the legal expenses associated with  
11 your firm's efforts to advise him in responding to the press allegations described above.  
12 Specifically, this allows Mr. Costello to use campaign funds to pay for expenses of  
13 services numbered 1, 2, 4, and 5.

14 Your letter indicates that there are no indictments or other criminal charges  
15 pending against Mr. Costello as to any of the matters described above and that he has not  
16 been identified as a subject or target of any criminal investigation. Accordingly, this  
17 request does not present the issue of using campaign funds for legal expenses incurred to  
18 present a legal defense to the possible civil liability of Mr. Costello or to alleged  
19 violations of criminal law by him.

20 You have explained, however, that your firm investigated allegations about  
21 Mr. Costello that were disclosed in the grand jury indictment or in trial testimony.  
22 The firm also advised and prepared Mr. Costello for his grand jury testimony and  
23 his possible trial testimony, and it communicated with the United States Attorney on

1 his behalf. These legal services relate to advising Mr. Costello with respect to his  
2 actual or possible testimony at court proceedings about allegations involving his  
3 activities as a Member of Congress. It appears that the legal counsel he obtained  
4 was, in part, directed to avoiding personal adversity and, to some degree, also  
5 directed to the alleviation of negative impact on his 1996 and 1998 campaigns for re-  
6 election. Compare Advisory Opinions 1995-23 and 1995-21.<sup>3</sup> In addition, Mr.  
7 Costello's interest in averting indictment and prosecution with regard to alleged  
8 unlawful activities as a Member of Congress is not solely personal. Accordingly, the  
9 Commission is of the opinion that personal, officeholder and campaign-related  
10 purposes are present with respect to these legal services. Therefore, the Commission  
11 concludes that the expenses for the legal services described in items 3 and 7 are for  
12 mixed purposes and may be paid from campaign funds only to the extent the  
13 services are for officeholder or campaign-related purposes. The firm and Mr.  
14 Costello will need to closely review all the services covered by these categories in  
15 order to make a reasonable allocation of the portion that may be lawfully paid with  
16 campaign funds. Based on the materials submitted by you in this request, it appears  
17 that the allocation of 50% for the campaign and officeholder related aspects of the  
18 services described in items #3 and #7 would be reasonable, and an amount reflecting  
19 that allocation could be paid from Mr. Costello's campaign funds.

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<sup>3</sup> Advisory Opinion 1995-23 allowed a candidate, who had been charged with illegally taking down his opponent's campaign signs, to use campaign funds to pay the cost of his defense. Advisory Opinion 1995-21 permitted a campaign committee to use campaign funds to challenge a sheriff's seizure of committee property to enforce a prior debt against the candidate.

1           **The request, item #6, also includes legal services to conduct research related**  
2   **to the application of the speech and debate clause of the United States Constitution**  
3   **to Mr. Costello, given his status as a Member of Congress during the time period in**  
4   **which the purported unlawful conduct allegedly occurred. The Commission**  
5   **concludes that this research was performed because some of the allegations in the**  
6   **Cueto trial pertained to Mr. Costello's role in the Congressional consideration of**  
7   **H.R. 878 (Indian tribal recognition) and his alleged financial interest in the**  
8   **enactment of the legislation; therefore, the research would not have been necessary**  
9   **except for the fact of his status as Member of Congress. Accordingly, the legal**  
10   **expenses for item #6 may be paid from campaign funds.**

11           **In addition to the legal services described above, your letter explains that other**  
12   **legal services were provided by your firm to Mr. Costello. Namely, item 8, legal services**  
13   **to research and advise with respect to the use of campaign funds for Mr. Costello's legal**  
14   **expenses. The expenses for such research and advice would not be incurred if Mr.**  
15   **Costello were not a candidate or officeholder with campaign funds that are available to**  
16   **him for campaign expenditures and other lawful disbursements under the Act and**  
17   **Commission regulations. Therefore, he may use campaign funds to pay the expenses**  
18   **described in item 8.**

19           **The cost of legal expenses consistent with this advisory opinion should be**  
20   **reported as an operating expenditure by Mr. Costello's campaign committee, with the**  
21   **purpose noted. See 11 CFR 104.3(b)(2) and (b)(4)(i); see also Advisory Opinions 1995-**  
22   **23 and 1995-21. In addition, billing documentation submitted by the firm to Mr.**  
23   **Costello's campaign committee should provide sufficient details as to the precise legal**

1 services rendered so that the committee has adequate records to determine which amounts  
2 are lawfully payable from campaign funds pursuant to this opinion. See 11 CFR 102.9(b)  
3 and 104.14(b).

4 The Commission expresses no opinion as to the possible applicability of state and  
5 Federal tax or other laws, or rules of the House of Representatives, to the matters  
6 presented in your request, since those issues are not within its jurisdiction.

7 This response constitutes an advisory opinion concerning application of the Act,  
8 or regulations prescribed by the Commission, to the specific transaction or activity set  
9 forth in your request. See 2 U.S.C. §437f.

10 Sincerely,

11 John Warren McGarry  
12 Chairman

13 Enclosures (AOs 1996-24, 1995-42, 1995-23, 1995-21)